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No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

REPORT OF SPECIAL MASTER ON MOTION OF TEXAS POWER AND LIGHT COMPANY TO INTERVENE

John A. Carver, Jr.
Special Master

600 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

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January 23, 1981

The Supreme Court has referred to the Special Master the Motion of Texas Power and Light Company ("TP&L"), for leave to intervene in this original jurisdiction proceeding. This action was initiated by the State of Texas to resolve the location of a portion of its boundary with the State of Oklahoma along the Red River. The boundary between the states from the 100th meridian of longitude to the eastern border of Oklahoma is the south bank of the Red River. The issue in this suit is what constitutes the south bank of the river in the vicinity of Denison Dam near Denison, Texas.

The Texas-Oklahoma boundary has been the subject of numerous lawsuits. The Red River originally formed the boundary between the United States and the Spanish possessions, pursuant to the Treaty of 1819, 8 Stat. 252 (1821). In *United States v. Texas,* 162 U.S. 1 (1896), the Supreme Court construed the boundary definition of the Treaty as establishing the boundary between the Oklahoma Territory and the State of Texas as the south cut bank of the Red River. In *Oklahoma v. Texas,* 256 U.S.

70 (1921), the Court held that the admission of Oklahoma to statehood in 1906 did not affect this boundary. The Supreme Court provided a definition of what constitutes the south bank of the Red River in its partial decree in *Oklahoma v. Texas*, 261 U.S. 340 (1923). Both states agree that these prior decisions are *res judicata* and will form the basis for a determination of the present controversy.

In 1938 Congress authorized the construction of Denison Dam on the Red River, at a point approximately 5 miles north of the City of Denison in Grayson County, Texas. Flood Control Act of 1938, 52 Stat. 1215 (1938). The construction of the dam resulted in the formation of Lake Texoma west of the dam site. The lake is approximately 25 miles long and covers the former channel of the Red River. East of the Denison Dam the river was rechannelled for approximately one-half mile to accommodate hydroelectric facilities. The issue in this case is whether the impoundment of water in Lake Texoma and the rechannelling of the Red River below Denison Dam have altered the south bank of the river and thereby affected the boundary between Texas and Oklahoma. Texas asserts that the boundary remains the south cut bank of the river as it existed prior to the construction of Denison Dam. If TP&L were allowed to intervene, it would support this position. Oklahoma has not taken a definitive position as to the location of the boundary, other than to assert that the location of the south bank was rendered uncertain as a result of the construction of the dam.

The effect of the construction of Denison Dam on the Oklahoma-Texas boundary was first raised in a proceeding before the Federal Energy Regulatory Commission ("FERC"), concerning jurisdiction of the FERC over TP&L. *Texas Power and Light Company*, FERC Docket No. EL-9578. The FERC is authorized under the Federal Power Act to regulate the sale of electricity in interstate commerce. 16 U.S.C. § 824 (1976). TP&L purchases elec-

tricity generated at Denison Dam, from the Southwestern Power Administration, a part of the Department of Energy, U.S. Government, which it then sells to private customers and interconnected utilities, all of whom are located within the State of Texas. TP&L has historically been considered a purely intrastate utility not subject to FERC jurisdiction.

One issue raised in the FERC proceeding is whether the power generating house at Denison Dam is located in the State of Texas or the State of Oklahoma. The power house was constructed on the Texas side of the Red River as the river existed prior to the construction of Denison Dam. The FERC, however, has been urged to take the position that the boundary was changed by the construction of the dam and that the new boundary is the south shore of Lake Texoma and the south bank of the rechannelled portion of the river below the dam. If this contention were correct, the power house would be located north of the state line, in Oklahoma, and TP&L could be considered to be engaged in the interstate transmission of electricity and to be subject to the FERC's jurisdiction.

Texas intervened in the FERC proceeding and moved for a stay pending termination of this litigation. The stay was granted. TP&L has now moved to intervene in this action. It contends that it should be permitted to intervene because it has a distinct and compelling interest in being regulated by the Texas Public Utilities Commission and not by the FERC, which interest may not be adequately represented by the State of Texas, and because it was a principal in the underlying FERC proceeding.

The Special Master has considered briefs submitted by the states and by TP&L. Both states conclude that TP&L is not entitled to intervene in this proceeding. The Special Master agrees with this conclusion and recommends that the Motion of TP&L to Intervene be denied. In reaching this recommendation, the Special Master is guided by several prior Supreme Court decisions.

When the original jurisdiction of the Supreme Court is invoked by a state, that state is deemed to represent the interests of all of its citizens in the litigation. *Kentucky v. Indiana*, 281 U.S. 163 (1930). Unless a party can demonstrate a compelling interest in its own right, which is not properly represented by the state, intervention should not be allowed. *New Jersey v. New York*, 345 U.S. 369 (1953). TP&L relies primarily upon three cases in which intervention was allowed because the intervenors had a compelling interest in the subject matter of the litigation which was adverse to one or more of the sovereign parties.

South Dakota v. Nebraska, 429 U.S. 810 (Motion to File Complaint granted Oct. 4, 1976), is an original proceeding to determine state jurisdiction over an island in the Missouri River. The river forms the boundary between the two states. The purported private owners, who are in possession of the island, have made claims to title which are adverse to South Dakota. The Court has allowed the private owners to intervene in the action and assert their claims. *Id.*, 434 U.S. 948 (1977). *See*, TP&L Brief, Appendix, for text of Special Master's Report. Similarly, in *Texas v. Louisiana*, 426 U.S. 466 (1976), a boundary case brought to determine the lateral seaward boundary between Texas and Louisiana, the City of Port Arthur, Texas was allowed to intervene to protect its interests in the island claims asserted by the United States.

In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court was faced with conflicting claims by Oklahoma, Texas and the United States to ownership of the south half of the bed of the Red River. Numerous private parties were allowed to intervene to assert their claims to the disputed land and to proceeds from the sale of oil and gas produced therefrom. The Court allowed intervention because the claims of the private parties were adverse to each other and to one or more of the principal litigants and because the parties had no other forum in which to assert their claims. 258 U.S. at 581.

The position of TP&L in this matter differs substantially from that of the intervenors in the above-cited cases. TP&L has asserted no adverse claim to property which might be affected by a change in the state line, nor has it asserted any claim against either state which could properly be considered in determining the present location of the state line. Indeed, TP&L's Motion and Supplementary Brief leave no doubt that TP&L's argument is with the FERC and not with either of the states. This is an action to determine an interstate boundary. It is not an administrative review proceeding. The only interest of TP&L cognizable by the Court in this original action is the proper adjudication of the Texas-Oklahoma boundary. On this issue TP&L seeks the same determination as Texas, and for aught the Special Master can determine from the pleadings, the same determination as Oklahoma. TP&L's interest in such a determination is not imbued with any special character, apart from that of other citizens and creatures of the State of Texas, which cannot be represented and protected by that state.

If TP&L were allowed to intervene and make its regulatory status an issue in this boundary dispute, then fairness would dictate that other parties in the FERC proceeding, including the staff of the FERC, also be given an opportunity to intervene to present their views on the regulatory issue. The matter would not end there, however, because each interconnected utility and conceivably all utility customers would also be entitled to intervene and present their views.

The original jurisdiction of the Supreme Court is to be invoked sparingly. As noted in *New Jersey v. New York*, 345 U.S. 369, 373 (1953), this jurisdiction should not be expanded to the dimensions of an ordinary class action merely to accommodate every party who may be collaterally affected by a decision in the case. In *New Jersey v. New York*, the Court refused to permit the City of Philadelphia

to intervene because the city failed to establish a compelling interest in its own right, apart from its interest in a class with all other citizens and creatures of the state, which was not properly represented by its sovereign. Likewise, in *Utah v. United States,* 394 U.S. 89 (1969), the Court refused to permit intervention for the sole purpose of permitting a private party to introduce new issues which were not raised by the sovereigns directly concerned.

The Special Master believes these two cases are controlling in the instant situation and accordingly recommends that the Motion of Texas Power and Light Company to Intervene on behalf of the State of Texas be denied.

DATED at Denver, Colorado, January 23, 1981.

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Special Master

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